

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**MEDTECH PRODUCTS INC.,  
90 North Broadway  
Irvington, New York 10533**

**Plaintiff,**

**v.**

**POWER PRODUCTS, INC.  
d/b/a SPLINTEK,  
3325 Wyoming Street  
Kansas City, Missouri 64111**

**Defendant.**

**Civil Action No. 07 CV 3305 (SCR)**

**DECLARATION OF CHARLES SCHRANK**

I, Charles Schrank, pursuant to 28 U.S.C. § 1746, declare and say as follows:

1. My name is Charles Schrank. I am a Senior Vice President of Marketing for Prestige Brands Holdings, Inc., the parent corporation of Medtech Products Inc. ("Medtech"). I also am responsible for marketing of oral care products for Medtech. I am over the age of 18 and have personal knowledge of the facts and circumstances discussed herein. I submit this declaration in support of Medtech's Motion for Preliminary Injunction.

2. Medtech markets, distributes, and sells a dental protector designed to protect the teeth and jaw from the detrimental effects of bruxism under the trademarks THE DOCTOR'S® and NIGHTGUARD™ (hereinafter "NIGHTGUARD").

3. Medtech's predecessor-in-interest, Dental Concepts LLC, began using the NIGHTGUARD mark in association with the marketing, distribution, and sale of dental protectors on or about January 1997 (hereinafter, Dental Concepts and Medtech are collectively

referred to as "Medtech"). From January 1997, and for several years thereafter, the NIGHTGUARD dental protector was the only significant such product on the over-the-counter ("OTC") market and generated substantial recognition among consumers.

4. Medtech's packaging and advertising has always featured the NIGHTGUARD mark. From January 1997 through the present, Medtech's THE DOCTOR'S® NIGHTGUARD packaging has consistently and prominently featured the NIGHTGUARD mark on the front of the packaging. True and correct copies of the front of THE DOCTOR'S® NIGHTGUARD packaging from before Fall 2006, and from Fall 2006 through the present, are attached hereto as Exhibits A & B, respectively.

5. In the Fall of 2006, Medtech changed its packaging and revised its labeling to conform to the new FDA approval, which was received on March 3, 2006. Beginning in January 2007, Medtech's television advertising featured the purple, red, and white packaging and new labeling shown in Exhibit B.

6. Medtech sells the NIGHTGUARD dental protector with an insert captioned "At-Home Fitting Instructions" that describes the dental protector product and how the customer should use the product. The "At-Home Fitting Instructions" have been developed specifically for use with the NIGHTGUARD dental protector since October, 2006. A true and correct copy of the "At-Home Fitting Instructions" are attached hereto as Exhibit C.

7. Target is a retail chain that sells Medtech's NIGHTGUARD brand dental protectors.

8. In the past three years alone, Medtech has spent more than \$8,000,000 in advertising and promotion to build the NIGHTGUARD brand name. Since use of the NIGHTGUARD mark began, Medtech has used the mark to market its dental protector through

advertisements on nationally syndicated radio networks and shows and on cable television. True and correct copies of examples of television advertisements which consistently display or include the NIGHTGUARD mark are attached hereto as Exhibits D & E.

9. Over the past six years, Medtech has sold more than \$43,000,000 of its NIGHTGUARD dental protector products.

10. As a result of the recent cable advertising campaign (Exhibit E) sales increased from an average of 53,000 units per month to an average of 89,000 units per month. Attached hereto as Exhibit F are true and correct copies of charts reflecting the increase in sales due to an advertising campaign that began on September 17, 2006.

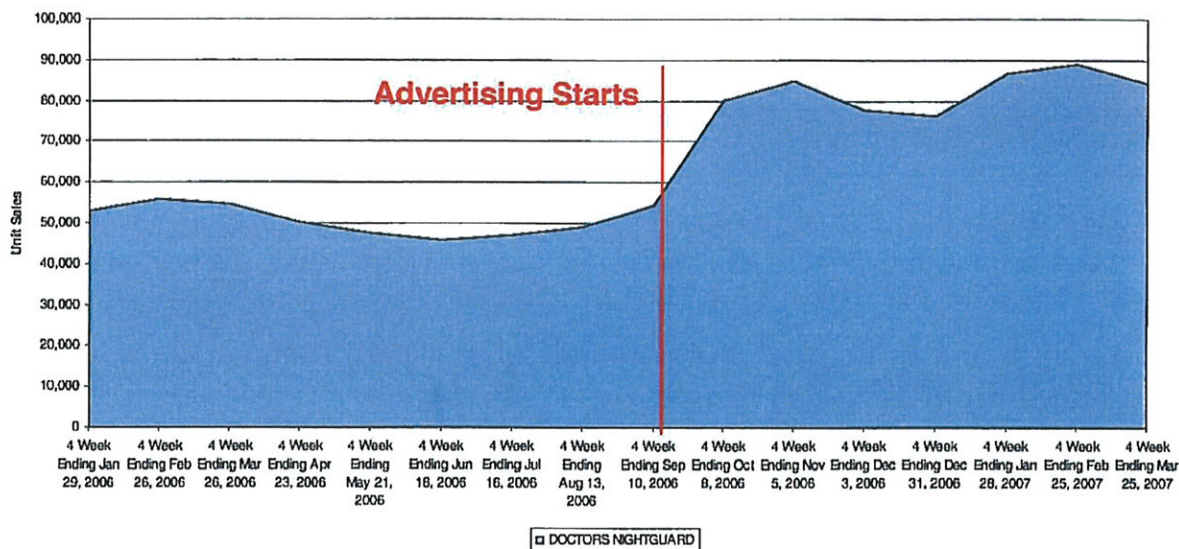
11. Power Products is currently marketing and selling an OTC dental protector for nighttime tooth grinding or bruxism. A true and correct copy of the front of the Power Product dental protector packaging is attached hereto as Exhibit G. A true and correct copy of the "Care and Fitting Instructions" from Power Products' dental protector is attached hereto as Exhibit H.

12. Medtech receives certain information from independent consumer reporting services that track, weekly, sales of consumer products in various retail outlets ("independent consumer reporting"). This information is commonly considered reliable and is used in Medtech's industry to track sales of retail products.

13. Based on the independent consumer reporting Medtech has received, Power Products began selling its dental protector product in Longs Drugs, a California-based drug store, during the week that Medtech began its advertising campaign, September 17, 2006.

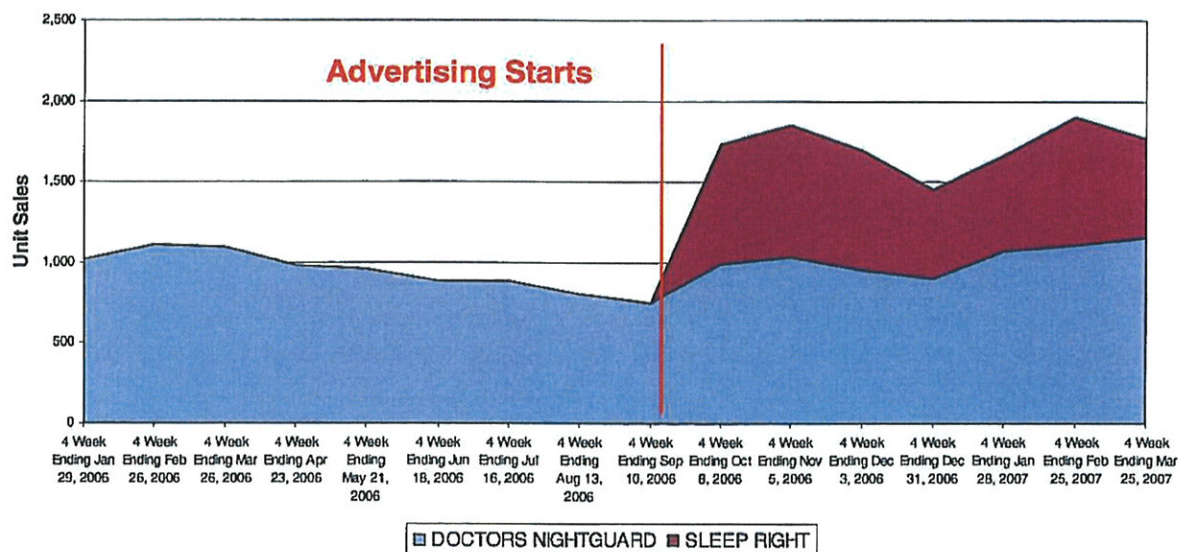
14. After the television campaign, sales of Medtech NIGHTGUARD dental protectors increased substantially in most retail stores. This is graphically demonstrated in Exhibit I (reprinted below) which shows the national trending up of sales of Medtech's dental protector.

Total US- 4 week IRI F/D/M and Walmart Retail Link Unit Sales - Total Doctors Nightguard - Jan06-Mar07



15. However, in Longs Drugs, a chain of retail stores where Power Products had entered into direct competition with Medtech, the increase in sales in the market went to the Power Products' dental protector. This is also graphically demonstrated in Exhibit I, with the spike that nationally went to Medtech being depicted in maroon, and going to Power Products:

LONGS DRUG - IRI 4 Wk Unit Sales Doctors NightGuard and SleepRight Mouth Guard - Jan06-Mar07





16. Medtech has received further information from independent commercial reporting services that, beginning in the last week of March 2007, Power Products began to sell its products in the Michigan based Meijer food chain, with an average retail price of \$39.99.

17. Medtech's independent consumer reporting also reveals that Power Products sells its dental protectors at retail price points between \$34.95 for the "Low-Profile" and "Select" products, to \$99.95 for the "Advance" dental protector.

18. Medtech's average retail price is \$24.99.

19. The NIGHTGUARD dental protector is covered by a valid U.S. Patent No. 6,830,051 ("the '051 Patent"), issued by the U.S. Patent and Trademark Office on December 14, 2004. A true and correct copy of the '051 Patent is attached as Exhibit J.

20. Medtech has registered its copyrights in the "At-Home Fitting Instructions" and current packaging of the NIGHTGUARD dental protector with the U.S. Register of Copyrights (U.S. Reg. No. TX 6-536-309, issued April 23, 2007). A true and correct copy of the copyright registration is attached as Exhibit K.

21. Medtech owns a pending federal trademark application for its NIGHTGUARD mark (NIGHTGUARD, Ser. No. 77/056,556, United States Patent and Trademark Office).

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED THIS 23rd DAY OF MAY, 2007.

  
\_\_\_\_\_  
CHARLES SCHRANK